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In the Supreme Court of the United States

OCTOBER TERM 1916

No. 31, Original

EX PARTE THE PARK SQUARE AUTOMOBILE STATION,
PETITIONER FOR A WRIT OF MANDAMUS

BRIEF FOR THE RESPONDENT

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EX PARTE THE PARK SQUARE AUTOMOBILE STATION, PETITIONER FOR A WRIT OF MANDAMUS.

BRIEF FOR THE RESPONDENT.

The petitioner prays a writ of mandamus commanding the respondent the Judge of the District Court for the Northern District of New York to remand to the Superior Court of the state of New Hampshire an action which had been removed from that court by the defendant therein.

The action is a plea of the case brought by the Park Square Automobile Station against the American Locomotive Company in the Superior Court of New Hampshire for breach of contract (p. 2*), which was entered in that court at the September term 1914 (p. 6).

The defendant appeared specially and filed (p. 6) a petition (p. 7) and bond (p. 9) for removal of the action to the District Court for the Southern District of New York, alleging that the plaintiff was a corporation organised

*The pages referred to are those of the printed record of *Park Square Automobile Station* v. *American Locomotive Co.* in this Court No. 140, Oct. Term, 1916.

under the laws of Maine and a citizen of that state and that the defendant was a corporation organised under the laws of New York and a citizen of that state and its general offices were in the city of New York.

This application for removal was denied by the state court on the 28th September 1914 and the defendant excepted (p. 11).

On the 3rd December 1914 the defendant filed a motion for trial by the court or a reference to an arbitrator (p. 14), but no action was ever taken upon it.

Afterwards the defendant applied for leave to amend its petition for removal so as to pray for removal to the District Court for the Northern District, instead of the Southern District, of New York, and by alleging that its principal place of business was in Schenectady in the state of New York instead of in the city of New York (pp. 27–28), and the defendant filed with its application a bond corresponding with the proposed amendment (p. 30).

The amendment was allowed (so far as the court had power) and the amended petition denied, 25th January 1915 (p. 31), and no further proceedings were had in the state court.

The case was entered by the defendant in the District Court for the Northern District of New York on the 1st February 1915 (p. 68) and the defendant moved to amend its petition and to substitute an amended bond as above mentioned (p. 70).

The plaintiff moved to remand the case (p. 69) and the Judge of the District Court on the 28th April 1915 made an order denying the motion (p. 85). His opinion is printed in the record p. 71 (222 Fed. 979).

The plaintiff now makes this application for a mandamus to compel the Judge to remand the case.

Upon an order to show cause the Judge of the District Court for answer returned a copy of the record of his Court.

1. *The Remedy by Mandamus*

It is submitted that this is not a proper case for the issue of a writ of mandamus, and that it was so decided by this Court in the recent case of *Ex parte Harding*, 219 U. S. 363, 372, 380 (since applied in *Ex parte Roe*, 234 U. S. 70, 73).

In that case it was shown that, by a long line of decisions, of which *Ex parte Hoard*, 105 U. S. 578, was one, an order refusing to remand a cause to a state court could not be reviewed upon an application for a mandamus, and could only be reviewed upon appeal or writ of error like other decisions upon questions of jurisdiction (219 U. S. pp. 369, 372).

The cases of *Ex parte Wisner*, 203 U. S. 449, and *In re Moore*, 209 U. S. 490, in which such orders were reviewed upon applications for a mandamus, were referred to and expressly disapproved so far as they dealt with the questions upon such applications (219 U. S. p. 379).

In these two cases the objection to the order refusing to remand was the same as in the present case, namely, that the case had been removed to the wrong district. In the former it was held that, as the action had been removed into a district in which it could not have been originally brought in a federal court, it ought to have been remanded, and a mandamus was issued. In the latter there was the same objection, but this Court held that the plaintiff had waived it by taking a step in the action after the removal without raising the objection, and a mandamus was refused.

In the present case, there is the diversity of citizenship that gives a right of removal, and the action has been removed into the district where it could have been brought

in the federal court originally, and the plaintiff claims, notwithstanding the decision in *Ex parte Wisner*, 203 U. S. 449, that it could not properly be removed into that district.

The case of *Ex parte Harding*, 219 U. S. 363, is conclusive that the decision of the District Court refusing to remand the action cannot be reviewed on an application for a mandamus. The judgment in that case (at pp. 373–374, 376, 379) shows that the exceptional doctrine of *Virginia* v. *Rives*, 100 U. S. 313, has no application to this case.

It is submitted therefore that the application for a mandamus should be refused with costs.

2. *The Removal of the Action*

It is also submitted, if the merits of the decision of the District Court are considered, that the action was properly removed to the District Court for the Northern District of New York, which was the district of *the residence of the defendant*, and in which the action might have been brought according to the Judicial Code 1911, s. 51 (36 Sts. 1101).

The defendant followed the rule laid down in *Ex parte Wisner*, 203 U. S. 449, where an action was brought in a Missouri state court by a citizen of Michigan against a citizen of Louisiana, and the defendant removed it into the U. S. Circuit Court for the district of Missouri in which it was pending. The decision was that it could not be removed to that district, notwithstanding s. 3 of the act of 1888, (now Judicial Code 1911, s. 29), because by the previous section, it could only be removed to a district in which it might have been brought in the federal court in the first instance, and, as neither of the parties was a

citizen of Missouri, it could not have been brought in the federal court there (pp. 457, 460).

The present action being a suit of a civil nature between *citizens of different states* (Judicial Code 1911, s. 24) might have been brought in the district of the residence of *either the plaintiff or the defendant* (s. 51). It was consequently a suit of which the U. S. District Court in each of those districts was given jurisdiction by the act, and, the defendant, being a *non-resident* of the state where it was brought, had a right by s. 28 to remove it to the U. S. District Court for *the proper district*. The only question is what is the proper district, and *Ex parte Wisner*, 203 U. S. 449, 457, settles that it is the district where it might have been brought in the first instance, and not the district in which it is pending in the state court (see *In re Moore*, 209 U. S. p. 513). Otherwise it would result that a defendant could never remove a case, except when he was sued in the state of the plaintiff's residence, whereas the statute gives him a right to remove it whenever he is sued in any one of the 48 states *except* that of his own residence.

The Judge of the District Court accordingly decided that this case was removed to the proper district, and refused to remand it (record p. 71; 222 Fed. 979), and to the same effect are the decisions in

Stewart v. *Cybur Lumber Co.*, 211 Fed. 343 (Toulmin J., Alabama S. D.).

Keystone Development Co. v. *American Locomotive Co.*, 63 Pittsburgh Legal Journal 161 (Carpenter J., Common Pleas, Allegheny County, Pa., 1914) referred to by Ray J. in his judgment in this case (transcript pp. 82–83; 222 Fed. p. 991).

Cefalo v. *Pennsylvania Coal Co.* (Witmer J., Penn. M.D. No. 846, Oct. 1916).

The contrary has been decided in the following districts, viz.:

St. John v. *U. S. Fidelity Co.*, 213 Fed. 685 (Rose J., Maryland).

St. John v. *Taintor*, 220 Fed. 457 (A. N. Hand J., New York S. D.).

Pavick v. *Chicago Milwaukee & St. Paul Ry. Co.*, 225 Fed. 395 (Geiger J., Wisconsin E. D.).

Eddy v. *Chicago & North Western Ry. Co.*, 226 Fed. 120 (A. L. Sanborn J., Wisconsin W. D.).

The difficulty arises from the inconsistency between the 28th and 29th sections of the Judicial Code 1911 (36 Sts. 1094–5), relating to the removal of causes, which are as follows,

> Section 28. Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the district courts of the United States are given original jurisdiction by this title, which may now be pending or which may hereafter be brought, in any State court, may be removed by the defendant or defendants therein to the district court of the United States for the proper district. *Any other suit* of a civil nature, at law or in equity, of which the district courts of the United States *are given jurisdiction by this title*, and which are now pending or which may hereafter be brought, *in any State Court*, may be removed into the district court of the United States *for the proper district* by the defendant or defendants therein, *being non-residents of that State. . . . And where* a suit is now pending, or may hereafter be brought, in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such *citizen of another State*, may remove such suit into the district court of the United States for the proper district, at any time before the trial

thereof, when it shall be made to appear to said district court that *from prejudice or local influence* he will not be able to obtain justice in such State court, or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause, &c.

Section 29. Whenever *any party entitled to remove* any suit mentioned in the last preceding section, except suits removable on the ground of prejudice or local influence, may desire to remove such suit from a State court to the district court of the United States, he may make and file a petition, duly verified, in such suit in such State court at the time, or any time before the defendant is required by the laws of the State or the rule of the State court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, *for the removal* of such suit into *the district court* to be held *in the district where such suit is pending*, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such district court, within thirty days from the date of filing said petition, a certified copy of the record in such suit, and for paying all costs that may be awarded by the said district court if said district court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the State court to accept said petition and bond and proceed no further in such suit. Written notice of said petition and bond for removal shall be given the adverse party or parties prior to filing the same. The said copy being entered within said thirty days as aforesaid in said district court of the United States, the parties so removing the said cause shall, within thirty days thereafter, plead, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in the said district court.

The provisions of the same act relating to the jurisdiction of the District Courts are as follows:

> Section 24. The district courts shall have original jurisdiction as follows:
>
> First. Of all suits of a civil nature, at common law or in equity, . . . or, where, the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and . . . is between *citizens of different States, &c.*

> Section 51. Except as provided in the five succeeding sections, no persons shall be arrested in one district for trial in another, in any civil action before a district court; and, except as provided in the six succeeding sections, *no civil suit* shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is *an inhabitant;* but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of *the residence* of either *the plaintiff or the defendant.*

It is perfectly plain that this is a suit "*of which* the district courts of the United States *are given jurisdiction by*" s. 24 of the act.

The suit is therefore one that the defendant being a non-resident of New Hampshire, has a right to remove, under s. 28, from the State court to the District Court *for the proper district* (*Louisville & Nashville Rld. Co.* v. *Western Union Telegraph Co.*, 218 Fed. 91, 101 (Cochran J., Kentucky E. D.)).

By s. 29, which describes the *procedure* for removal, it is provided that the defendant shall apply by petition to the State court for removal of the suit into the District Court *in the district where the suit is pending*, and shall afterwards

enter a copy of the record in that court and the cause shall proceed as if originally commenced there.

It might have been thought that s. 29 by these provisions defined the district of New Hampshire as *the proper district* for the removal of the suit. But in *Ex parte Wisner*, 203 U. S. 449, this Court held that the district where the suit was pending was not the proper district, when it was not the residence of either the plaintiff or the defendant, because s. 1 of the act of 1887 (corresponding to ss. 24 and 51 of the present act) limited the original jurisdiction of the then Circuit Court to suits brought in the district of the residence of either the plaintiff or the defendant (p. 456), and no suit was removable unless it could have been originally brought in that court (p. 457). And in the same case this Court said that the district of the residence of the plaintiff would be the proper district (p. 457).

This makes it plain that s. 29 *does not limit* the right of removal to cases where the proper district is the district where the suit is *pending*.

As this action might have been brought originally in the District Court in the district of the residence of either *the plaintiff* or the *defendant*, and as the only restriction on removal by the defendant is that he shall be a *non-resident* of the state in which the suit is pending, it follows that the district of the residence of *the defendant* was also the proper district as well as the district of the plaintiff's residence (as mentioned by Fuller C.J. in *In re Moore*, 209 U. S. p. 513).

The history of the legislation shows that the confusion arises only from the circumstance that in 1887 and 1888 a change was made in the provisions regulating *the right* of removal, without a corresponding change in *the procedure*.

The sections 28 and 29 of the present statute only continue in force (with immaterial variations), sections 2 and 3 of the acts of 1887 and 1888 (24 Sts. 553–554; 25 Sts. 434–435), and the sections 24 and 51 of the present statute correspond to section 1 of those acts.

These three sections of the acts of 1887 and 1888 are amendments of the three first sections of the act of 1875 (18 Sts. 470) in which no such inconsistency existed.

The inconsistency in the later acts was caused by the changes made in the sections 1 and 2 without a corresponding change in section 3 that would have made them consistent.

In each of these acts, s. 1 defines the jurisdiction of the then Circuit Courts, s. 2 specifies the right of removal, and s. 3 regulates the proceedings for removal.

The jurisdiction of suits "in which there shall be a controversy between citizens of different states" was the same under s. 1 of each act in all material respects, except as regards the district in which the suit might be brought.

In the act of 1875 (18 Sts. 470) the provisions of s. 1 regarding the *district* was

> "And no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that of which he is *an inhabitant*, or in which he shall be *found* at the time of serving such process or commencing such proceeding, except" &c.

In the acts of 1887 and 1888 (24 Sts. 552; 25 Sts. 434) the provision was

> "and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is *an inhabitant;*

but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the *residence of either the plaintiff or the defendant.*"

As regards the right of removal, the provisions were different.

The provision of s. 2 of the act of 1875 (18 Sts. 470) was,

"That any suit of a civil nature, at law or in equity, now pending or hereafter brought *in any State court* . . . in which there shall be *a controversy between citizens of different States* . . . *either party* may remove said suit into the Circuit Court of the United States for the proper district."

But in the acts of 1887 and 1888 (24 Sts. 553; 25 Sts. 434) the provision, after providing for suits arising under the Constitution, &c., was

"Any other suit of a civil nature, at law or in equity, *of which* the circuit courts of the United States *are given jurisdiction by the preceding section*, and which are now pending, or which may hereafter be brought, *in any State Court*, may be removed into the circuit court of the United States *for the proper district* by the defendant or defendants therein being *non-residents of that State.*"

The provision of s. 3 of each of the acts is, like s. 29 of the present statute, that the party entitled to remove the suit shall apply for removal to the Circuit Court *in the district where the suit is pending.*

This provision was entirely consistent with the ss. 2 and 3 of the act of 1875, for the right of removal under s. 2 of that act did not in any way depend upon the case being one of which original jurisdiction was given by s. 1.

But it was not consistent with s. 2 of the acts of 1887 and 1888, which *limited the right* of removal to cases of

which *original jurisdiction* was given by s. 1 and provided that suits in such cases should be removed to *the proper district*, while s. 1 provided that suits of which original jurisdiction was given should be brought only in the district of *the residence of either the plaintiff or the defendant.*

(*a*) The inconsistency was caused by changing the provisions of the act of 1875 that gave *the right* of removal, without amending the provisions respecting *the procedure* for removal.

But the clauses containing these provisions were expressed (24 Sts. 552, 553) to be *amendments* of the corresponding sections of the act of 1875. The provisions limiting the right of removal and defining *the proper district* into which the removal shall be made, are the amendments of the former statute, while the provisions as to the manner of proceeding, so far as they are not changed, are only a *continuation* of those previously in force without amendment (*Steamship Co.* v. *Joliffe*, 2 Wall. 450, 458; *Bear Lake Irrigation Co.* v. *Garland*, 164 U.S. 1, 12). The amendments necessarily supersede the inconsistent provisions of the former statute.

If s. 3 of the act of 1875 had been left entirely untouched, and ss. 1 and 2 had been amended, as they were, so as to provide that suits might be removed to the Circuit Court for the district in which such a suit might have been commenced in that Court, there would be no doubt that the provision in s. 3, that the petition for removal should pray a removal into the Circuit Court for the district in which the suit was pending, would be superseded, so far as it was inconsistent with them. But that is very nearly what has happened. The 3rd section of the act of 1875 was only amended by changing the provision regarding the time of applying for the removal, and the rest was left as it was, except in immaterial particulars.

Amendment of a statute by enacting that it shall "read as follows," incorporating the amendments, does not have the effect of a new statute as to the old parts (*Ely* v. *Holton*, 15 N. Y. 595; *Homnyack* v. *Prudential Insurance Co.*, 194 N. Y. pp. 460–461).

(*b*) If, on the other hand, the act of 1888 were an entirely new statute, instead of only an amending statute, it would be necessary to modify the provisions relating to procedure (s. 3) to avoid the inconsistency with the provisions giving the right of removal (ss. 1, 2).

The rule of construction in such cases was stated by Lord Wensleydale in *Grey* v. *Pearson*, 6 H. L. C. p. 106, and often approved (*Caledonian Ry. Co.* v. *North British Ry. Co.*, 6 App. Cas. p. 131), as follows,

> "I have been long and deeply impressed with the wisdom of the rule, now, I believe, universally adopted, at least in the Courts of Law in Westminster Hall, that in construing wills and indeed *statutes*, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some *absurdity*, or some *repugnance* or *inconsistency* with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further."

The provision of s. 3, that the suit shall be removed to the Circuit Court for the district in which it is *pending*, is inconsistent with the provisions of s. 1, as interpreted in *Ex parte Wisner*, 203 U. S. 449, limiting the districts in which the jurisdiction may be exercised, and does not supersede those provisions, according to the same decision.

By this decision, the right of removal is not limited to cases where the suit might properly be removed to the U. S. court for the district where it is pending. And it

would be absurd so to limit it, for then the only case in which a suit could be removed would be when it was brought in a State court in the district of *the residence of the plaintiff*. Yet there are 47 other States in which the defendant might have been sued, and s. 2 gives a right of removal of suit "brought *in any State court*" if the defendant or defendants are "*non-residents of that State.*"

This would be a plain case for modifying the words of s. 3, regulating procedure, so as to avoid the inconsistency and to prevent the absurdity of superseding by them the provisions of s. 2, relating to jurisdiction (see *Ayers* v. *Watson*, 113 U. S. p. 598).

Ex parte Wisner, 203 U. S. 449, 457, went on the ground that s. 2 was not superseded by s. 3 and that the suit might be removed to the U. S. court in another *proper district*, but there is a slip in the opinion of Fuller C.J. in the sentence (p. 457).

> "As it is the non-resident defendant alone who is authorised to remove, the Circuit Court for the proper district is evidently the Circuit Court of the district of the residence of the plaintiff."

The words "or of the defendant" ought to be added in order to make the sentence accurate, for the defendant was a non-resident of the state where the suit was brought, or he could not have removed at all, and it is pointed out at p. 456, that the proper district for bringing the suit in the Circuit Court would have been the district of the residence *of either the plaintiff or the defendant*. The mistake is corrected by Fuller C.J. in his dissenting opinion in *In re Moore*, 209 U. S. p. 513, where he says that the proper district intended by s. 2 was either of these districts. There is nothing to the contrary in the judgment of the majority

of the Court, which went on the ground that the objection to the removal to the Circuit Court in the district where the suit was pending had been waived by the plaintiff.

In the cases in which the District Courts have held in circumstances similar to those of the present case that the suit could not be removed to a district other than that where it was pending, controlling effect has generally been given to the provisions of s. 29 of the present statute relating to procedure.

In *Eddy* v. *Chicago & North Western Ry. Co.*, 226 Fed. 120, 125, A. L. Sanborn J. seems to have been influenced by the fact that the suit was removed to the district of the *defendant's* residence (Wisconsin) "to which defendants would not have been entitled to removal if the action had been begun in Wisconsin." But the action *was not* begun in Wisconsin, and the fact that he could not have removed it from a State court in Wisconsin, if it had been begun there, is no reason why he should not remove it from a State court in Minnesota, where it *was* begun, to the U. S. Court in Wisconsin.

In *New York Coal Co.* v. *Sunday Creek Co.*, 230 Fed. 295 (West Virginia S. D.) Keller J. held that an action against two corporations of different States could not be removed to the district of the residence of one of them, and that the words of s. 29 controlled. He also intimates that "the underlying principle of removal" (p. 297) does not exist when the defendant is sued in "a neutral state." But it is plain that the statute gives the defendant a right to have his case tried in a U. S. court when he is sued in the courts of a state of which he is a non-resident, and the right of removal in cases of prejudice or local influence is provided for by a different clause of the statute. The words of the statute are inconsistent with an intention to limit the right

of removal to cases where the suit is brought in the state of the plaintiff's residence, and they cannot be restricted by reference to an imaginary underlying principle.

3. *The Question of Waiver*

The defendant did not waive the right of removal by anything that it did in the State court after its application for removal had been refused by the State court and the defendant had excepted (p. 11).

The defendant might have tried the case out in the State court and taken every step that was open by way of defence, without waiving the right of removal which the State court had refused to recognise.

Railroad Co. v. *Koontz*, 104 U. S. 5, 15–17.
Cheshire Bank v. *Jaynes*, 224 Mass. 14, 19–20.

He does waive it, if, instead of confining himself to contesting the case alleged against him, he brings forward in the State court an affirmative claim in his own favor against the plaintiff or a third party.

Texas & Pacific Ry. Co. v. *Eastin*, 214 U. S. 153, 159.
Merchants Heat Co. v. *Clow*, 204 U. S. 286.

The defendant did not invoke the jurisdiction of the State court to enforce any claim whatever in its own favor. All that it did was to apply to that court to direct the manner in which the plaintiff's claim against it should be tried (transcript p. 14), and that was only a step in contesting the claim, and clearly not a waiver.

In *Hanover Bank* v. *Smith*, 13 Blatch. 224, all the steps taken by the defendant in the cause, which were held to

constitute a waiver, were taken before the defendant claimed to remove the case, while in the present case the application as to the mode of trial was made after his application to remove the action had been refused and the defendant had excepted.

ROBERT G. DODGE.